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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION

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Chapter V

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

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CHAPTER V

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

A. Introduction

1. The Commission, at its thirtieth session (1978), included the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in its programme of work and appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur. 1/

2. The Commission, from its thirty-second (1980) to its thirty-sixth session (1984), received and considered five reports from the Special Rapporteur. 2/ The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur's third report to the thirty-fourth session of the Commission in 1982. The five draft articles were proposed in the Special Rapporteur's fifth report to the thirty-sixth session of the Commission in 1984. They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

3. The Commission, at its thirty-sixth session (1984), also had before it the following materials: the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, amongst other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures referred to in the schematic outline 3/ and a study prepared by the secretariat entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law". 4/

1/ At that session the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic, and to report to it thereon. For the report of the Working Group see Yearbook ... 1978, vol. II, (Part Two), pp. 150-152.

2/ For the five reports of the Special Rapporteur, see Yearbook ... 1980, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2; Yearbook ... 1981, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2; Yearbook ... 1982, vol. II (Part One), p. 51, document A/CN.4/360; Yearbook ... 1983, vol. II (Part One), p. 201, document A/CN.4/373; Yearbook ... 1984, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

3/ Yearbook ... 1984, vol. II (Part One), p. 129, document A/CN.4/378.

4/ Yearbook ... 1985, vol. II (Part One) Addendum, document A/CN.4/384.

4. The Commission, at its thirty-seventh session (1985), appointed Mr. Julio Barboza Special Rapporteur for the topic. The Commission received eight reports from the Special Rapporteur from its thirty-seventh session (1985) to its forty-fourth session (1992). 5/ At its fortieth session (1988), the Commission referred to the Drafting Committee draft articles 1 to 10 proposed by the Special Rapporteur for Chapter I (General Provisions) and Chapter II (Principles). 6/ At its forty-first session (1989), the Commission also referred to the Drafting Committee the revised version of those articles which had already been referred to the Drafting Committee at the previous session. 7/

5. At its forty-fourth session (1992), the Commission established a Working Group to consider some of the general issues relating to the scope, the approach to be taken and the possible direction of the future work on the topic. 8/ On the basis of the recommendation of the Working Group, the Commission at its 2282nd meeting on 8 July 1992, took the following decisions:

"(a) Scope of the topic

5/ For the seven reports of the Special Rapporteur, see Yearbook ... 1985, vol. II (Part One), p. 97, document A/CN.4/394; Yearbook ... 1986, vol. II (Part One), p. 145, document A/CN.4/402; Yearbook ... 1987, vol. II (Part One), p. 47, document A/CN.4/405; Yearbook ... 1988, vol. II (Part One), p. 251, document A/CN.4/413; Yearbook ... 1989, vol. II (Part One), p. 131, document A/CN.4/423; document A/CN.4/428 and Corr.1 and 4 (all languages), Corr.2 (English only), and Corr.3 (Spanish only) and Add.1; document A/CN.4/437 and Corr.1 and document A/CN.4/443 and Corr.1 and Corr.2 (Spanish only).

6/ For the text see Yearbook ... 1988, vol. II (Part Two), p. 9.

7/ See Yearbook ... 1989, vol. II (Part Two), para. 311. Further changes on some of those articles were again proposed by the Special Rapporteur in his Sixth Report, see (Official Records of the General Assembly, Forty-fifth Session, Supplement No. 10) (A/45/10), para. 471.

8/ Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10 (A/47/10), p. 127-129.

(i) The Commission noted that, in the last several years of its work on this topic, it has identified the broad area and the outer limits of the topic but has not yet made a final decision on its precise scope. In the view of the Commission, such a decision at this time might be premature. The Commission, however, agreed that, in order to facilitate progress on the subject, it would be prudent to approach its consideration within that broad area in stages and to establish priorities for issues to be covered.

(ii) Within the understanding set forth in paragraph (i) above, the Commission decided that the topic should be understood as comprising both issues of prevention and of remedial measures. However, prevention should be considered first; only after having completed its work on that first part of the topic would the Commission proceed to the question of remedial measures. Remedial measures in this context may include those designed for mitigation of harm, restoration of what was harmed and compensation for harm caused.

(iii) Attention should be focused at this stage on drafting articles in respect of activities having a risk of causing transboundary harm and the Commission should not deal, at this stage, with other activities which in fact cause harm. In view of the recommendation contained in paragraph (ii) above, the articles should deal first with preventive measures in respect of activities creating a risk of causing transboundary harm and then with articles on the remedial measures when such activities have caused transboundary harm. Once the Commission has completed consideration of the proposed articles on these two aspects of activities having a risk of causing transboundary harm, it will then decide on the next stage of the work."

"(b) <u>The approach to be taken with regard to the nature of the article or of the instrument to be drafted</u>

(iv) In the view of the Commission it would be premature to decide at this stage on the nature of either the articles to be drafted or the eventual form of the instrument that will emerge from its work on this topic. It would be prudent to defer such a decision, in accordance with the usual practice of the Commission, until the completion of the work on the topic. The Commission will examine and adopt the articles proposed for this topic, in accordance with its usual practice, on the basis of the merits of the articles, their clarity and utility for the comtemporary and future needs of the international community and their possible contribution to the promotion of the progressive development of international law and its codification in this area."

"(c) <u>Title of the topic</u>

(v) In view of the ambiguity in the title of the topic as to whether it includes 'activities' or 'acts', the Commission decided to continue with its working hypothesis that the topic deal with 'activities' and to defer any

formal change of the title, since in the light of the future work on the topic additional changes in the title may be necessary. The Commission will therefore wait until it is prepared to make a final recommendation on the changes in the title."

"(d) Recommendation on the report of the Special Rapporteur for the next year

(vi) The Commission took note with thanks and appreciation of the previous reports of the Special Rapporteur in which the issues of prevention were examined in respect of both activities having a risk of causing and those causing transboundary harm. It requested that the Special Rapporteur, in his next report to the Commission, should examine further the issues of prevention only in respect of activities having a risk of causing transboundary harm and propose a revised set of draft articles to that effect. 9/"

6. At its forty-fifth session (1993), the Commission considered the ninth report of the Special Rapporteur (A/CN.4/450) devoted to the issue of prevention and referred draft Article 10 (non-discrimination), which the Commission had examined at its forty-second session (1990), and articles 11 to 20 bis to the Drafting Committee. The Drafting Committee provisionally adopted articles 1 (scope of the present articles), 2 (use of terms), 11 (prior authorization), 12 (risk assessment) and 14 (measures to minimize the risk) 10/ However, the Commission took no action on the articles. 11/

9/ Ibid.

10/ Document A/CN.4/L.487 and Corr.1 (French and Spanish only)

11/ See Official Records of the General Assembly, Forty-eight session, Supplement No. 1 (A/48/10), p.46, para. 106.